SUPREME COURT, U.S.
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No. 03-1452

IN THE SUPREME COURT OF THE UNITED STATES

G. A. MUELLER, Warden, California State Prison at Folsom, *Petitioner*

v.

JEFFREY WELTON NUNES, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

QUIN DENVIR
Federal Defender
for the Eastern District of California

DANIEL J. BRODERICK
Chief Assistant Federal Defender
Counsel of Record

801 I Street, 3rd Floor
Sacramento, California 95814
(916) 498-5700
Counsel for Respondent

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RULES OF THE SUPREME COURT OF THE UNITED STATES

Supreme Court Rule 10 7

I. QUESTION PRESENTED BY PETITIONER FOR REVIEW

May a federal court refuse to give deference to a state court factual finding because the state court did not hold an evidentiary hearing, without determining whether clear and convincing evidence rebuts the finding?

II. STATEMENT OF THE CASE

A. Introduction

On June 9, 2004, Jeffrey Nunes was released from state prison. He is not on parole and the district attorney's office for Solano County opted not to reinstate the voluntary manslaughter plea offer that was never conveyed to Mr. Nunes by his ineffective trial counsel over a decade ago.[1] Thus, even though he is a free man today, Jeffrey Nunes remains convicted of second degree murder.

Despite these facts, Petitioner seeks certiorari review by this Court. This petition should be denied because an accurate examination of Mr. Nunes's fact-bound case reveals that it has nothing at all to do with the question that Petitioner presents. The opinion by Northern Illinois Senior Judge Milton Shadur, sitting by designation in the Ninth Circuit, scrupulously and accurately applies the AEDPA standard of review, as dictated by this Court in *Williams v. Taylor*, 529 U.S. 420 (2000). That opinion also explains in detail how the dissenting opinion (and Petitioner in this certiorari petition) manifestly mischaracterizes the state court record. Judge Shadur's opinion correctly found that, under the facts of this case, the state court's decision was *both* an unreasonable application of clearly established Supreme Court law and an unreasonable

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[1] The habeas relief ordered was "to direct the state to release Nunes within 120 days unless it offers Nunes the same material terms that were contained in the original plea offer." App. to Pet., p. 19.

determination of the facts in light of the evidence before the state court. Habeas relief was properly granted.

B. Statement of Material Facts

Prior to Mr. Nunes's fourth trial, the prosecutor made his one and only plea offer. This offer was relayed off the record to Mr. Nunes' court-appointed attorney. The only time that the defense lawyer talked to Mr. Nunes about this plea offer was on the same day the offer was made, during a five-minute, in-custody discussion. At that time, the lawyer misinformed Mr. Nunes about the terms of the plea offer and incorrectly told the prosecutor that Mr. Nunes had rejected the offered plea.

1. State Court Adjudication

Mr. Nunes raised the issue of ineffective assistance of counsel in his state habeas petition that was consolidated with his direct appeal to the state court of appeal. He accompanied his petition with his declaration, a factual declaration from his appellate attorney, a declaration from his mother, excerpts of transcript records from other proceedings involving his trial attorney, and declarations from other attorneys and an investigator regarding the trial attorney. In addition, because his case was proceeding hand in hand with his direct appeal, the state court of appeals had before it the full record from the trial court.

Mr. Nunes requested an evidentiary hearing on his habeas claim, but the state appellate court denied Mr. Nunes's request for a hearing on the stated grounds that it accepted his version of the facts. Despite this statement, the state court of appeal denied Mr. Nunes state habeas relief on the ground that it rejected his factual assertions. The state court of appeal also made several other findings.

(a) The state court of appeal found that Mr. Nunes's "assertions that he was unable to raise the issue with his attorney before trial are simply not credible. Even if he could not reach his attorney on the telephone, he appeared in court with his counsel before and during the trial." App. to Pet., p. 115. This finding was directly contradicted by the reporter's transcripts presented to the state court of appeal, showing that his attorney did not appear in court with Mr. Nunes on four separate occasions when trial was scheduled to begin, and that Mr. Nunes appeared in court on one of these occasions without any attorney and told the trial judge on the record that he had not talked to his attorney. Mr. Nunes also presented to the state court of appeal exhibits corroborating his contention that his attorney did not communicate with his clients. During the federal evidentiary hearing, the attorney himself confirmed that he was unavailable prior to Mr. Nunes' trial and the attorney testified that when he met with Mr. Nunes for five minutes, he told Mr. Nunes he was a "fucking asshole" and "stupid" and he (the attorney) didn't have time to explain it all to him.

(b) The court of appeal found that Mr. Nunes "has made no showing that he could not have raised the question with the trial court, asked for a clarification of the terms, and accepted the offer." App. to Pet., p. 115. However, the court of appeal had before it the transcripts of superior court proceedings showing that the plea offer was neither made nor mentioned in court on the one day it was open. The defense attorney met with Mr. Nunes in custody on that date and Mr. Nunes did not return to court or have any contact with his attorney until twelve days later. By then, the plea offer had long ago expired, the case was scheduled for trial, and a jury ready.

Moreover, as the federal evidentiary hearing clarified, Mr. Nunes never received notice of the actual terms of the prosecutor's offer. Mr. Nunes' defense counsel did not accurately

communicate the plea offer and when Mr. Nunes asked for clarification from his attorney, the attorney never responded. As stated in the corroborating declaration of his appellate attorney filed with the state court of appeal, the prosecutor stated the offer was for 11 years, with no further consecutive prison terms. The offer conveyed by ineffective defense counsel was for 22 years, including a consecutive term for use of a firearm.

(c) The court of appeal stated that Mr. Nunes "would most likely believe that, at trial, he would have a very good chance of a voluntary manslaughter conviction." App. to Pet., p. 115. As the federal magistrate judge found, however:

> [T]he first two trials were mistrials because the jury could not reach a unanimous verdict of second degree murder. Petitioner's trial counsel testified that his recollection was that it was always hung in favor of the life sentence. The third trial, where petitioner was convicted of second degree murder and use of a firearm, was reversed because the trial judge spoke with the jury outside the presence of the defendant and his trial attorney. The reversal of the third trial's verdict was due to a procedural error and should not have bolstered the petitioner's confidence in obtaining a manslaughter verdict from the fourth jury.

App. to Pet., p. 48.

(d) The state court of appeal stated that Mr. Nunes "faced a mid-term of six years in prison, with credit for approximately five years he had already been in prison...as compared to 11 years in prison, including a waiver of all pre-sentence credits." App. to Pet., p. 115-116. In fact, the actual plea offer was not for eleven more years in prison, but five and one-half more years in prison. In addition, Mr. Nunes had been convicted of second degree murder at his third trial and, after that conviction, Mr. Nunes was sentenced to 17 years in prison. So Mr. Nunes knew in advance of his fourth trial what his sentence would be if convicted and, in fact, Mr. Nunes received an identical 17 year sentence after his fourth trial. Finally, Mr. Nunes had already been

convicted of additional assault charges and faced a mandatory two-year sentence for use of a firearm that would be consecutive to any manslaughter sentence.

2. Federal Court Adjudication

The federal court conducted an evidentiary hearing on Mr. Nunes' habeas claims. The factual evidence introduced at that hearing included evidence that Mr. Nunes had indicated repeatedly prior to trial that he was amenable to negotiating a plea bargain and that he was willing to plead guilty to voluntary manslaughter. Mr. Nunes's defense at trial was that he was guilty of voluntary manslaughter with a firearm. Mr. Nunes had expressed a willingness to plead guilty several times before the plea offer. He even wrote superior court judges letters indicating he was willing to accept a plea to voluntary manslaughter. App. to Pet., pp. 52-53. All of this objective, corroborating evidence was ignored by the state court of appeal, even though such evidence was specifically listed by the California Supreme Court as factors to be considered in evaluating a claim like Mr. Nunes'. The federal magistrate judge further found:

> The state Court of Appeal correctly set forth the factors that the court should take into account to determine whether a defendant, with effective assistance, would have accepted the offer...However, the Court of Appeal failed to adequately examine most of the above factors...The appellate court stated that it did not need to resolve whether trial counsel correctly communicated the terms of the plea agreement...the appellate court chose to reiterate conflicting statements trial counsel made to appellate counsel and respondent's counsel...The appellate court chose to either ignore or find incredible the conflicting testimony of petitioner...More important, however, were the appellate court's failure to ascertain what advice, if any, was given by trial counsel to petitioner concerning the plea offer, and its failure to inquire into the disparity between the terms of the proposed plea offer and the probable consequences of proceeding to trial, as viewed at the time of the offer.

App. to Pet., pp. 45-46.

The magistrate judge concluded from these and other facts that Mr. Nunes received

constitutionally ineffective assistance from his appointed counsel and that Mr. Nunes was prejudiced by this ineffective assistance. The magistrate judge found that as of November, 2002, Mr. Nunes had served more than three years in prison longer that he would have served under the prosecutor's intended plea offer.

III. ARGUMENT:

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. Petitioner Ignores the Alternative Ground for the Decision (i.e. Unreasonable Application of *Strickland v. Washington*), Which Renders the Assertedly Certworthy Issue of No Practical Importance in This Case.

Although Petitioner fails to address it, the magistrate judge, district judge, and Court of Appeal opinion in this case also granted habeas relief on the alternative ground that the state court of appeal had unreasonably applied clearly established federal law as determined by this Court in *Strickland v. Washington*, 466 U.S. 688 (1984). After a lengthy discussion of the underlying facts and law, the magistrate and district judge found that "the state court's approach to the prejudice analysis in this case led to a decision that was contrary to the prejudice test enunciated in Strickland." App. to Pet., pp. 51, 84 (adopting magistrate judge findings).

The federal court of appeal made an identical finding. "We hold that the state court's rejection of Nunes' habeas claim is unreasonable under both Sections 2254(d)(1) and (2)." App. to Pet., p. 13. As the court explained:

> Those assertions certainly suffice to support an ineffective assistance claim, and there was ample evidence in the record before the state court to support those assertions.[footnote omitted] With the state court having purported to evaluate Nunes' claim for sufficiency alone, it should not have required Nunes to prove his claim without affording him an evidentiary hearing -- and it surely would not have required Nunes to prove his claim with absolute certainty. Nunes needed only to

> demonstrate that he had sufficient evidence for a reasonable fact finder to conclude with "reasonable probability" that he would have accepted the plea offer, a probability "sufficient to undermine the result" (*Strickland*, 466 U.S. at 694.) He met that burden, and to the extent that the state court demanded more it applied the *Strickland* test unreasonably. In other words, it was objectively unreasonable for the state court to conclude on the record before it that no reasonable factfinder could believe that Nunes had been prejudiced.

App. to Pet., pp. 14-15.

B. The Petition for a Writ of Certiorari Should Be Denied Because this Case Does Not Meet the Requirements of Supreme Court Rule 10.

Supreme Court Rule 10 states that the Court will grant a petition for a writ of certiorari "only for compelling reasons." Supreme Court Rule 10(a) discusses the reasons the Court might be inclined to grant a petition with respect to a case decided by a United States Court of Appeals. Petitioner repeatedly mischaracterizes the federal appellate opinion below in a vain effort to shoehorn this fact-bound, unique case into one of the reasons listed in Rule 10.

1. There is No Federal Circuit Conflict At Issue In This Case.

The panel opinion very thoroughly outlines the deferential standard of review mandated by the AEDPA in §2254 cases (App. to Pet., pp. 9) and the opinion assiduously applies that standard, dedicating over three pages to its examination of the state court's objectively unreasonable factual analysis. Id. at 13-17. Petitioner doesn't even appear to disagree with that analysis; he apparently just wants the federal courts out of the business of reviewing state convictions.

Petitioner, nonetheless, asserts that there is a circuit split on the issue of what deference the federal court should give to state court factual findings made without evidentiary hearings. Petitioner argues that Mr. Nunes's case adds to this asserted conflict; however, Petitioner fails to

mention that the federal appellate opinion in this case specifically avoids coming down either way on this issue:

> If we rather view the state court's findings as a factual determination, the outcome there is equally problematic under the AEDPA. Its assessment of the evidence went well beyond its self-assigned task of assessing Nunes' allegations for sufficiency to determine whether Nunes would be entitled to relief. State court findings are generally presumed correct unless they are rebutted by clear and convincing evidence or based on an unreasonable evidentiary foundation [citations omitted]...But with the state court having refused Nunes an evidentiary hearing, we need not of course defer to the state court's factual findings -- if that is indeed who those stated findings should be characterized -- when they were made without such a hearing...
>
> While there may be instances where the state court can determine without a hearing that a criminal defendant's allegations are entirely without credibility or that the allegations would not justify relief even if proved, that was certainly not the case here....

App. to Pet., p. 15.

The federal court of appeal highlighted two important facts distinguishing Mr. Nunes' case from other federal habeas cases reviewing state court convictions:

(a) "Mueller does not contend that Nunes actually received a full and fair hearing on his claim or that he failed to develop the factual basis of his claim in state court." App. to Pet., p. 17, n.8; and

(b) "Mueller does not challenge on appeal either the federal district court's decision to grant an evidentiary hearing in this Section 2254 proceedings or the district court's factual findings after having done so." Id. at 17.

Mr. Nunes' case is simply not the case for this Court to use in determining what deference the federal court should give to state court factual findings made without evidentiary hearings.

2. Uncontested Clear and Convincing Evidence Demonstrated The State Court's Unreasonable Determination of the Facts.

This is also not a case where the federal appellate court "broadly rejects the presumptive validity of any state court ruling in a criminal case resting on an implied or express factual finding not resulting from a state evidentiary hearing." Pet. for Cert. p. 7. This is a case where the state court of appeal got it wrong, factually, procedurally, substantively, objectively, and unreasonably.

The federal appellate court, quite correctly, found the state court action an unreasonable determination of the facts. "It is particularly unacceptable for that court to have eschewed an evidentiary hearing on the basis that it was accepting Nunes' version of the facts, then to have given the lie to that rationale by discrediting Nunes' credibility and rejecting his assertions." App. to Pet., p. 15, n. 7.

The federal appellate court further found that the state court of appeal made an unreasonable determination of the facts that were actually presented to it. App. to Pet., pp. 15-16. Indeed, as shown in the above statement of facts *all* of the factual findings by the state court of appeal were wrong and, unlike the unsupported statement made by the dissenting federal appellate judge, *all* of the facts underlying the state court opinion were contradicted in the federal evidentiary hearing.

As the federal appellate court expressly noted,

> Because the dissent suggests otherwise, we stress that we do not hold (or even hint) that the state court erred because it evaluated the facts differently than we would have or because it arrived at a different result. Instead, the state court's decision was objectively unreasonable because that court made factual findings (that is, it drew inferences against Nunes where equally valid inferences could have been made in his favor, and it made credibility determinations) when it

rather claimed to be determining prima facie sufficiency...

> Viewed either as a finding of fact or as a determination of law, then, the state court's determination was objectively unreasonable. Nunes had adduced sufficient evidence to support his allegations that his attorney failed to convey the correct plea bargain and that he suffered prejudice as a result.

App. to Pet., pp. 16-17.

Presumptive correctness under the AEDPA can be rebutted. It was rebutted in Mr. Nunes' case. Presumptive correctness under the AEDPA also does not preclude a federal evidentiary hearing, when facts exist such as those facts present in Mr. Nunes' case. And it is too late for Petitioner to imply now that this Court should ignore the factual findings of that evidentiary hearing or to deem that hearing unnecessary. "Mueller does not challenge on appeal either the federal district court's decision to grant an evidentiary hearing in this Section 2254 proceedings or the district court's factual findings after having done so." App. to Pet., p. 17.

In Mr. Nunes' case, uncontested clear and convincing evidence demonstrated the state court's unreasonable determination of the facts underlying his habeas claim of ineffective assistance of counsel at trial.

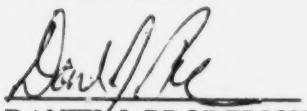
IV. CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Dated: July 9, 2004

Respectfully submitted,

QUIN DENVIR
Federal Defender



DANIEL J. BRODERICK
Chief Assistant Federal Defender
Counsel of Record

Attorneys for Respondent
JEFFREY WELTON NUNES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

QUIN DENVIR
Federal Defender
for the Eastern District of California

DANIEL J. BRODERICK
Chief Assistant Federal Defender
Counsel of Record

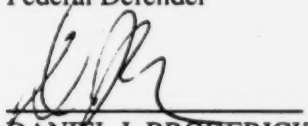
801 I Street, 3rd Floor
Sacramento, California 95814
(916) 498-5700
Counsel for Respondent

Pursuant to Rule 39 of the Rules of the United States Supreme Court, the Respondent, Jeffrey Welton Nunes, requests leave to file the accompanying Respondent's Brief in Opposition to Petition for a Writ of *Certiorari* without prepayment of fees or costs, and to proceed in forma pauperis. Mr. Nunes was appointed counsel at government expense under the Criminal Justice Act, 18 U.S.C. § 3006(a)(2)(B), by the United States District Court for the Eastern District of California on .

Dated: July 9, 2004

Respectfully submitted,

QUIN DENVIR
Federal Defender



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Chief Assistant Federal Defender
Counsel of Record

Attorneys for Respondent
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JEFFREY WELTON NUNES

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, Daniel J. Broderick, being first duly sworn, depose and say:

On July 9, 2004, the RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS was served on all parties required to be served in compliance with Supreme Court Rule 29.3, by depositing the documents, addressed to counsel as follows:

BY US MAIL:
VIOLET LEE
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664

Executed at Sacramento, California, on July 9, 2004.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DANIEL J. BRODERICK